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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1943

No. 850

ORANGE THEATRE CORPORATION,
a corporation

Petitioner

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF

ISRAEL B. GREENE
Of Counsel with Petitioner
1180 Raymond Boulevard
Newark 2, New Jersey

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HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Orange Theatre Corporation, a corporation, created and existing under and by virtue of the Laws of the State of New Jersey, with its principal office in the City of Newark, New Jersey, respectfully shows:

A

Summary Statement of the Matter Involved [1]

This is an application for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment dated January 10, 1944 (Supp. App. 11) affirming two orders of the United States District Court for the District of New Jersey,[2] the first of which extended the respondents' time to assert their objection to venue and the second of which dismissed the complaint against them because of improper venue (App. 124, 125).

Petitioner brought this suit in the United States District Court for the District of New Jersey, under the Federal Anti-Trust Laws (15 U. S. C. A., Sect. 1, *et seq.*) to recover treble damages and to enjoin further violations of said Statutes (App. 12, 18).

Pursuant to the Court's order for process (App. 1, 7, 12, 18), the five defendants-respondents were served in New York City and Brooklyn, New York, by their respective local United States Marshals on the following dates:— Harry Brandt, David Weinstock and Benjamin Weinstock, were served on October 17, 1940 (App. 7, 12); Emanuel Hertzig and J. Joshua Goldberg were served on October 18 and 21, 1940, respectively (App. 7, 12).

On November 7, 1940 (after the expiration of the time to answer of the respondents Harry Brandt, David Weinstock and Benjamin Weinstock),[3]—all five respondents—obtained a written stipulation from plaintiff extending

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1. Page references "App." are to the Appendix of the record used in the Circuit Court of Appeals, 10 copies whereof have been filed with this petition for Certiorari.

Page references "Supp. App." are to supplemental record containing decision and judgment of Circuit Court of Appeals.

2. Both orders were entered on April 26, 1943 (App. 124, 125).

3. Rule 12 (a) of the Federal Rules of Civil Procedure affords a defendant 20 days to serve his answer. Since the defendants, Harry Brandt, David Weinstock and Benjamin Weinstock were served on October 17, 1940, their time to answer expired on November 6, 1940.

their time to "answer or otherwise move with respect to the complaint" until November 22, 1940 (App. 4). By a similarly worded written stipulation dated November 22, 1940, the time was further extended to November 25, 1940 (App. 5).

Both of these stipulations were entitled in the cause, and were signed by the "attorney for the defendants (respondents)" and were duly filed with the Clerk of the District Court (App. 1, 13). There is nothing in these stipulations from which to infer that the appearances of the respondents were under protest, or limited to challenging the venue or jurisdiction over the person, or that they had any objection whatsoever to the venue or jurisdiction or that they desired to reserve their privilege of objecting to same.

On November 25, 1940, the five respondents served a joint motion to dismiss the complaint on the ground of improper venue[1] (App. 6).

By an opinion filed November 6, 1941 and reported in 2 F. R. D. 278 (App. 7-10), District Judge Walker sustained the respondents' motion; and by order dated November 17, 1941 he dismissed the complaint as to the respondents (App. 11).

Petitioner promptly appealed to the Circuit Court of Appeals for the Third Circuit. The matter was argued before a three-judge court; but because of the importance of the questions raised, the Court ordered a reargument before the entire court *en banc*.

In an opinion filed on August 6, 1942 (reported in 130 F. 2d 185), the Circuit Court of Appeals reversed the order appealed from (App. 12-17). It held that under the Rules of Civil Procedure, the stipulations were ineffective to extend the respondents' time to answer or move against the complaint; that under Rule 6(b), the District Judge was without power to extend the respondents' time to

1. The attorney for respondents admits that his original motion was based on "objection to *venue*" (App. 20, Par. 8).

make said motion, in the absence of proof of "excusable neglect;" that since the respondents failed to make their *venue* objection within time, they lost that objection, and were in default entitling petitioners to the entry of default under Rule 55(a), the entry of which was a "purely formal matter" (App. 12-17). In its opinion, the Circuit Court of Appeals intimated that after the case was remanded, the respondents might "apply to the trial judge to be permitted to answer under Rules 55(c) and 60(b)" (App. 16).

The mandate of the Circuit Court of Appeals filed August 26, 1942 (App. 24) "ORDERED, ADJUDGED and DECREED * * * that the order of the said District Court be and the same is hereby *reversed* with costs."

On August 17, 1942, respondents' attorney applied, ex-parte, to District Judge Fake,[1] and obtained an injunctive order restraining petitioner from entering a default judgment, and directing it to show cause why the respondents should not be permitted to renew their motion notwithstanding the reversal by the Circuit Court of Appeals (App. 17-23).

On the return of that order to show cause (September 14, 1942), Judge Fake entered a Rule of Reversal which adjudged that the order of Judge Walker made on November 17, 1941 *"be and the same is hereby vacated, set aside, and for nothing holden; that the complaint be reinstated as against the said defendants, * * * and that the cause be restored to the trial list"* (App. 46-47).

The minutes of that hearing show that Judge Fake denied the respondents' application to renew their motion addressed to venue (App. 35, 43), but granted their oral motion to file an "answer" in the express language of the opinion of the Circuit Court of Appeals (App. 41, 42, 43, 44, 102). That respondents' attorney fully understood Judge Fake's ruling is indicated by his statement on the record (App. 41) that he was to prepare an order

1. Judge Walker had resigned in the meantime.

giving him "20 days within which to *respond* to the complaint." The minutes further show that Judge Fake admonished respondents' attorney that if he asserted the defense of improper *venue* in his answer "the chances are a hundred to one" that he would strike it out on motion (App. 43). The attorneys left with the understanding that respondents' attorney was to prepare an order in accordance with Judge Fake's ruling and submit it to petitioner's attorney for approval (App. 40, 102).

On September 15, 1942, respondents' attorney appeared before Judge Fake, ex-parte, while he was engrossed in writing an opinion (App. 63), and obtained his signature to an order which not only extended respondents' time to answer, but also gave them leave to renew their motion (App. 47).

Petitioner promptly moved to vacate or modify that order (App. 48-53). Judge Fake opened his order pending his decision on the motion (App. 62, 63, 92, 124).[1]

After argument, Judge Fake called for briefs (App. 93), which were filed. Seven months later (April 17, 1943), he filed an opinion (App. 101-104) in which he sustained the form of the order dated September 15, 1942. He thereupon on April 26, 1943 entered the two orders. The *first* ordered "that the order made on September 15, 1942, which was opened for the purpose of said motion, be and is now made the order of this Court *as of the 26th day of April, 1943,* and that the plaintiff's motion to vacate, or in the alternative, to modify the same, is hereby denied" (App. 124). The *second* order again dismissed the complaint against the respondents, in the exact language of the former order made by Judge Walker, which

1. On the argument (September 28, 1942) he said:

"Well to be perfectly frank about it, I was in the midst of writing an opinion here in which my mind was more on that opinion than it was on this order, and it may well be that I signed something more than the opinion that I had given before" (App. 63).

was reversed by the Circuit Court of Appeals (App. 125-126, 11).

The record shows that Judge Fake was troubled about the construction of the opinion of the Circuit Court of Appeals (App. 27). In the course of the arguments before him, he suggested that an application be made to the Circuit Court of Appeals for a Writ of Mandamus addressed to him, in order to clarify what he regarded as an ambiguity in its opinion (App. 27, 37, 62 (bottom), 64, 69, 79, 82). He made the order of dismissal in the identical language of Judge Walker's order to make it clear that he wanted to put the record in the same condition as it was before Judge Walker and to raise the same issues as were before the Circuit Court of Appeals on the first appeal, in order that the opinion of that Appellate Court be clarified (App. 120, 121, 122, 37, 33, 34, 68, 69, 78, 79).

Petitioner thereupon took a second appeal to the Circuit Court of Appeals to give effect, and to enforce the mandate of the Circuit Court of Appeals on the first appeal. *Litchfield* v. *Dubuque Pacific R. Co.*, 7 Wall. 270; 19 L. Ed. 150; *Re Blake*, 175 U. S. 114, 44 L. Ed. 94; *In re Potts*, 166 U. S. 263, 41 L. Ed. 994.

The second appeal came on before a three-judge court, which again ordered that the cause be argued before the entire court *en banc* (Supp. App. p. 1).

On January 10, 1944 the Circuit Court of Appeals filed a decision affirming the orders appealed from on the following grounds (Supp. App. 3-10):

1. The Circuit Court of Appeals admits that both in the District Court and on both appeals, the parties and all the courts treated the respondents' motion as raising only the defense of improper venue; that treating the objection as one of venue, their former decision reversing the District Court was correct, and the respondents lost their objection to venue by not asserting it seasonably (Supp. App. 4, 6).

2. That their further study has convinced them that the defense which the respondents sought to assert was not that of improper venue, but rather want of jurisdiction over their persons; that so treating the motion they are forced to conclude that the respondents' motion was not served out of time and should be sustained, unless that objection was waived by their voluntary appearance in the District Court; that although this objection was not urged in the District Court or on either of the appeals, they had a duty to consider it (Supp. App. 5, 6).

3. That the stipulations amounted to a voluntary appearance in the action, which gave the Court power to adjudicate the controversy against them. *Placek* v. *American Life Ins. Co.*, 288 Fed. 983 (D. C. Washington, 1923); that prior to the adoption of the Rules of Civil Procedure such a voluntary appearance operated as a waiver of any objection to the jurisdiction over the person; but that under the new Rules, such voluntary appearance does not operate as a waiver of such objection (Supp. App. 7, 9). The Court arrived at this conclusion on the premise that the new Rules had abolished the age-old distinction between general and special appearances (Supp. App. 8). According to the decision of the Circuit Court of Appeals a person may challenge the jurisdiction of the Court over his person even after he has voluntarily and generally appeared in the case.

The order of the Circuit Court of Appeals for the Third Circuit, affirming the judgments or orders last mentioned, was entered on January 10, 1944.

B

Jurisdiction

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed, is January 10, 1944.

2. The jurisdiction of this Court to issue the writ of certiorari herein prayed for, is invoked under Judicial Code, Sect. 240(a), as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Sect. 347).

3. Petitions for certiorari have been granted in the following cases involving issues analogous to those at bar: *Barnards* v. *Johnson,* 314 U. S. 19, 86 L. Ed. 11 (involving important question of appellate practice); *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 87 L. Ed. 1509 (involving question of venue); *Letulle* v. *Scofield,* 308 U. S. 415, 84 L. Ed. 355 (where a Circuit Court of Appeals decided a case on a point not raised by the parties).

C

The Questions Presented

This case presents the following questions:

1. May a Circuit Court of Appeals depart from and refuse to enforce its reversing decision and mandate on a former appeal, in the same cause, and between the same parties,—upon a second appeal which seeks to enforce such former decision and mandate?

2. May a defendant challenge the jurisdiction of a District Court over his person after he has entered a voluntary or general appearance in the cause?

3. Have the Rules of Civil Procedure abolished the age old distinction between general and special appearances?

4. May a Circuit Court of Appeals *sua sponte* raise and decide a point which was neither urged by the parties nor considered by the Court below, and thus place its decision on a ground contrary to the theory adopted by the parties and the Court below, and contrary to the law of the case as settled by the same Appellate Court on a former appeal?

5. Under the Rules of Civil Procedure (Rules 12 (b), (g), (h)), if a defendant has two objections, one, of improper venue, and the second, lack of jurisdiction over his person, and he only urges the venue objection, which is decided against him,—has he waived the objection of lack of jurisdiction over his person?

6. Where a defendant, after entering an appearance, moves to dismiss a complaint because of improper venue, upon facts which give rise to an objection to venue as well as an objection to lack of jurisdiction over his person, —may he assert the latter objection after the time to answer has expired and after the venue objection has been decided against him?

D

Reasons for the Allowance of the Writ

1. The decision of the Circuit Court of Appeals for the Third Circuit on the second appeal, is, in effect, a repudiation, nullification, and reversal of its decision and mandate on the first appeal. It did by indirection that which it could not have done directly because its term

had expired.[1] *Re National Park Bank of New York*, 256 U. S. 131, 65 L. Ed. 863, 864. Its refusal to adhere to and enforce its first decision and mandate is a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

2. The decision of the Circuit Court of Appeals for the Third Circuit, that under the Rules of Civil Procedure a defendant may challenge the jurisdiction of the Court over his person *after* entering a voluntary or general appearance, is revolutionary and in conflict with the following applicable decisions of this Court. *Pollard* v. *Dwight*, 8 U. S. 421, 2 L. Ed. 666, 669; *Toland* v. *Sprague*, 37 U. S. 300, 330, 9 L. Ed. 1093, 1105; *Kendall* v. *U. S.*, 37 U. S. 524, 623; 9 L. Ed. 1181, 1220; *Jones* v. *Andrews*, 10 Wall. (U. S. 327, 19 L. Ed. 935; *Shelton* v. *Tiffin*, 6 How. (U. S.) 163, 186, 12 L. Ed. 387, 397; *Creighton* v. *Kerr*, 20 Wall. (U. S.) 8, 12 L. Ed. 309, 310; *Cooper* v. *Reynolds*, 10 Wall. (U. S.) 308, 19 L. Ed. 931, 932; *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26.

3. The decision of the Circuit Court of Appeals for the Third Circuit that the Rules of Civil Procedure have abolished the age old distinction between general and special appearances is in conflict with the applicable decision of this Court and the other Circuit Courts of Appeal which have held that the new Rules merely changed the procedure and not substance, and that the new Rules merely abolished the labels "general" or "special", but did not affect the substance of such appearance. *Jackson* v. *Heiser*, 114 Fed. 2d 310, 312 (C. C. A., 9th); *Carter* v. *Powell*, 104 Fed. 2d 428 (C. C. A., 5th), rehearing denied 104 Fed. 2d 1012, cert. denied 308 U. S. 611, 84 L. Ed.

1. Rule 3 of the Rules of the Third Circuit Court of Appeals provides that "One term of the Court shall be held annually commencing on the first Monday of October."

511; *Cf.* Rule 82 of Federal Rules of Civil Procedure; Cleveland Institute Proceedings (1938), pp. 188, 242; Washington D. C. Institute Proceedings (1938), p. 231; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479; *U. S.* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1058; *Davis* v. *Davis, supra; Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 87 L. Ed. 1509.

4. The Circuit Court of Appeals for the Third Circuit by deciding the second appeal upon a ground not urged or raised by the parties (lack of jurisdiction over the person),[1] either before it or the court below, has departed from the accepted and usual course of judicial proceedings that an appellate court will not decide a case upon a question neither raised nor argued. *Letulle* v. *Scofield*, 308 U. S. 415, 84 L. Ed. 355; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 80 L. Ed. 154.

5. The Circuit Court of Appeals for the Third Circuit, in deciding the second appeal on the ground that the respondents' objection was to the Court's jurisdiction over their person, and not over venue, overlooked Rule 12 (b), (g), (h) of the Rules of Civil Procedure, which provides that where a litigant has several objections or defenses and urges only one of them, he is deemed to have waived the other objections. *Carter* v. *Powell*, 104 Fed. 2d 428 (C. C. A. 5th); rehearing denied 104 Fed. 2d 1012; cert. denied 308 U. S. 611, 84 L. Ed. 511; *Cf. Nakdimen* v. *Baker*, 111 Fed. 2d 778, 782 (C. C. A. 8th).

6. The decision of the Circuit Court of Appeals for the Third Circuit that the respondents had to assert their venue objection before their time to answer expired,—whereas, notwithstanding their *appearance*, they could assert their objection of lack of jurisdiction over them even after their time to answer had expired—makes

1. The Circuit Court of Appeals admits that throughout the litigation the respondents argued "*venue*" and not lack of jurisdiction over the person.

an artificial, impractical, and erroneous distinction between these objections and contrary to Rule 12(b) and (h) of the Rules of Civil Procedure. Both objections arise out of the same operative facts; both relate to the convenience of litigants, and, as such, are personal privileges which they may waive. Even before the adoption of the Rules of Civil Procedure, the decisions of this Court and other Circuits treated both types of objections alike and as one and the same. *Cf. Blank* v. *Bitker*, 135 Fed. 2d 962 (C. C. A. 7th) with *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 1000; *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 510, 54 L. Ed. 300, 304; *Seaboard Rice Milling Co.* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633, 634. This conflict should be settled by this Court.

7. This case involves important questions touching the powers and duties of the Circuit Courts of Appeal of the United States, and the binding effect of their decisions, and other important questions relating to procedure in civil cases, which should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; that the judgment of the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court; that the orders of the United States District Court for the District of New Jersey be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and meet.

ISRAEL B. GREENE,
of Counsel with Petitioner.